

CONFIDENTIAL

**REPUBLIC OF KENYA**



**MINISTRY OF DEFENCE**

**MEMORANDUM TO THE NATIONAL ASSEMBLY**

**ON**

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE  
REPUBLIC OF KENYA AND THE GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA**

**ON**

**DEFENCE CO-OPERATION**

## **1.0 OBJECTIVES**

1.1 The purpose of this Memorandum to apprise the National Assembly on the Agreement signed between the Government of the Republic of Kenya and the Government of the Republic of South Africa (hereinafter referred to as the Agreement) and to seek approval for its ratification.

## **2.0 BACKGROUND**

2.1 Negotiations between Government of Kenya and Government of South Africa on the subject Agreement commenced way back in 2007. Previously, the defence relations with South Africa were limited to the reciprocal exchange of military students, lecturers and instructors under a Memorandum of Understanding.

2.2 Inter-Ministerial consultations undertaken amongst the Ministries of Defence, Foreign Affairs and Office of the Attorney General at various meetings and through several correspondences, crafted the framework for the bilateral co-operation with the Republic of South Africa in order to widen its scope.

2.3 On 7 March 2016, the Defence Attaché and First Secretary/Legal at the High Commission for Kenya in South Africa met South Africa National Defence Force, Head of International Relations and agreed on the proposed text for the Agreement. The Agreement was further subjected to scrutiny by the Attorney General to ascertain its compliance with the Laws of Kenya resulting in the present agreement that was approved for signing by the Cabinet on 11 October 2016.

### **3.0 OBJECTS OF THE AGREEMENT**

3.1 The Agreement identifies its main objective as enhancing defence co-operation by identifying and providing a framework for co-operation for exchange of experiences and knowledge for the use and mutual benefit of the parties.

3.2 The Scope and goals of the defence co-operation areas include but are not limited to:

(a) The development and implementation of the security and defence policy.

(b) Exchange of military information on matters agreed upon subject to any restrictions of national security.

(c) The encouragement and facilitation of industrial co-operation between their respective industries in the fields of defence-related research, development and procurement of defence equipment.

(d) Military medical health service.

(e) Counter-piracy and other maritime safety activities.

### **4.0 CONTENTS OF THE AGREEMENT**

4.1 The Agreement is divided into Fifteen (15) Articles as follows:

a. Article 1 - Provides for the interpretation of terms.

b. Article 2, 3, 4 & 5 - Provide for the aim, scope, forms of co-operation and implementation respectively.

- c. Article 6 - Provides for Criminal Jurisdiction conferring primary jurisdiction on the Host Nation.
- d. Article 7 - Establishes the Joint Defence Committee responsible for oversight on the implementation of the Agreement. The Committee is required to meet once every two years alternately in the two States.
- e. Article 8 - Enumerates the obligations of both state parties in the promotion of community relations.
- f. Article 9, 10, 11, 12 and 13 - Provide for liability claims, finances, protection of information, medical and supplementary arrangements for effective implementation of the Agreement respectively.
- e. Article 14 and 15 - Provide settlement of disputes and amendments, entry into force and termination of the Agreement respectively.

## **5.0 LEGAL CONSIDERATIONS**

5.1 Section 37 of the Kenya Defence Forces Act as read together with Section 283 contemplates that the framework of co-operation between the Kenya Defence Forces and a Visiting Force as well as matters pertaining to jurisdiction are to be regulated by an agreement.

5.2 It is envisaged that during the implementation of the Agreement, it will be necessary to exchange personnel hence the need to identify their status while in the territory of the other party for purposes of application of criminal jurisdiction in accordance with section 37 of the Kenya Defence Forces Act.

5.3 The co-operation framework for exchange, sharing and utilization of the respective State's experience, knowledge, military facilities and infrastructure will be instrumental in strengthening bilateral relations between the Republic of Kenya and the Republic of South Africa. Further, the growing concerns on security challenges such as terrorism, organized international crimes such as piracy, human and drug trafficking necessitate collaboration and co-operation between States. The proposed Agreement will provide a framework for widening the regional approaches in addressing these challenges through collaboration and co-operation with the Republic of South Africa.

## **6.0 FINANCIAL IMPLICATIONS**

The implementation of the Agreement is not envisaged to have any financial implications.

## **7.0 THE NATIONAL ASSEMBLY IS INVITED TO:**

7.1 Take note of this Memorandum outlining the contents of the present Agreement.

7.2 Approve ratification of the Agreement.

Dated this ..... 24<sup>th</sup> ..... day of ..... April ..... 2017

  
**AMB. RAYCHELLE OMAMO, SC, EGH**  
CABINET SECRETARY, MINISTRY OF DEFENCE

## **ATTACHMENTS**

The signed Agreement.

**SECRET**



**AGREEMENT**

**BETWEEN**

**THE GOVERNMENT OF THE REPUBLIC OF KENYA**

**AND**

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**ON**

**DEFENCE COOPERATION**

**SECRET**

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PREAMBLE

The Government of the Republic of South Africa and the Government of the Republic of Kenya (hereinafter jointly referred to as the "Parties" and singularly as a "Party");

**STRIVING** to strengthen the good and friendly relations by means of close Defence cooperation;

**WISHING** to acknowledge and demonstrate their mutual commitment to the continued development of their defence relationship

**DESIRING** to draw the maximum benefit from their close defence cooperation;

**RECOGNISING** that such cooperation shall be in accordance with their respective national policies and international best practices and shall not conflict with the domestic law of their respective states nor impair the commitments undertaken by their countries in the international field;

**CONFIRMING** that the cooperation between the Parties promotes peace and stability and that this cooperation is not directed against any third country;

**PURSUANT** to the Agreement for the establishment of Joint Commission of Cooperation between the Parties signed on the 2nd of October 2007;

**IN CONSIDERATION OF** the needs of the South African National Defence Forces and the Kenya Defence Forces regarding cooperation in military training, visits and technical assistance and other related matters;

**HAVE REACHED** the following agreement:

## ARTICLE 1

### DEFINITIONS

In this Agreement, the following definitions apply:

a) "Armed Forces" Means the South Africa National Defence Forces or the Kenya Defence Forces.

b) "Authorised Service Organisation" Means any organization established and operated by the Service Authorities of a Party to provide services to its Armed Forces including welfare services.

c) "Dependant" Means a person who is not ordinarily resident in the Host nation and who is the wife, husband or child of a member of the Sending Nation.

d) "Exercise or Training" Means and includes bilateral exercises or training activities involving units and individuals, Short Term Training Teams, advisory support, exchanges and attachment of units.

e) "Host Nation" means the Party receiving members from the Sending Nation for implementation of this Agreement.

f) "Implementing Arrangement" Means a follow-on arrangement to this Agreement which may be concluded for specific activities and which shall detail the resources required to undertake that activity. The Implementing Arrangement shall be a document made under this Agreement and shall be interpreted consistently with its provisions. Either Party may propose an Implementing Arrangement.

g) "Sending Nation" Means the Party sending members to the Host Nation for implementation of this Agreement.

h) "Service Authorities" Means the authorities of the Host Nation or the Sending Nation by the law of their respective States to exercise command or jurisdiction over the Defence Forces.

## ARTICLE 2

### AIM

The aim of this Agreement is to enhance defence cooperation by identifying a framework for the exchange of experience and knowledge for the use and mutual benefit of the Parties.

## ARTICLE 3

### SCOPE AND GOALS

The Parties shall, in compliance with relevant domestic and international law, pursue the goal of defence cooperation in the following areas:

- (a) The development and implementation of the Security and defense policy.
- (b) The development and formulation of procedures for military cooperation between the Armed Forces.
- (c) The promotion of the training of military personnel through the exchange of trainees, instructors and observers
- (d) The exchange of military information on matters agreed upon subject to any restrictions of national security
- (e) The encouragement and facilitation of industrial cooperation between their respective industries in the fields of defence-related research, development and the procurement of defence equipment
- (f) Military medical health service
- (g) Cooperation in the exchange of knowledge and training in peace support operations



~~SECRET~~

- (h) Counter-piracy and other maritime safety activities
- (i) The encouragement of the exchange of military personnel at all levels to enhance sporting and cultural links between the Armed Forces and
- (h) Other areas of mutual interest which may be decided upon in the future.

#### ARTICLE 4

#### FORMS OF CO-OPERATION

Defence Cooperation between the Parties shall be based on the principle of reciprocity and shall be implemented primarily along the following lines:

- (a) Mutual visits by delegations of high-ranking representatives from the defence sector
- (b) Staff talks and technical meetings
- (c) Meetings between equivalent defence institutions
- (d) Exchange of teaching and training personnel as well as students from military training institutions
- (e) Participation in training courses, practical training, seminars, round-table discussions and symposia
- (f) Visits by Service personnel, warships and other Government ships and aircraft
- (g) Military exercises
- (h) Any other form of Military cooperation in areas agreed upon.

#### ARTICLE 5

#### IMPLEMENTATION

(1) All activities under this Agreement shall be implemented in conformity with the domestic law in force in the Host Nation. Implementation of some aspects of the programmes may be covered by Implementing Arrangements.

(2) The competent authorities responsible for implementation and coordination of the Agreement shall be the respective Cabinet Ministers of Defence/ Cabinet Secretaries of the Parties and the Parties shall designate a focal point of contact in their respective Ministries of Defence to implement this Agreement and coordinate the activities referred to herein.

(3) Members of the Sending Nation shall be treated, except as otherwise provided for in this Agreement, as members of the Host Nation of equivalent rank.

(4) Members of the Sending Nation shall not take part in hostilities or other operations of a warlike nature undertaken by the Armed Forces of the Host Nation, or in any operations of those forces which are concerned with the preservation of peace, internal security or with the enforcement of law and order.

(5) Members of the Sending Nation shall observe rules, orders and safety measures applied in the institution or establishment where activities take place, and shall abstain from infringing the laws of the Host Nation and from any political activities or any other activity that may be inconsistent with the spirit of this Agreement. South Africa and Kenya Service Authorities shall, respectively, take such necessary precautions or measures for the proper observance of these provisions.

(6) Members of the Sending Nation employed in training and advisory posts shall not be given operational responsibilities in the Armed Forces of the Host Nation.

## ARTICLE 6

### CRIMINAL JURISDICTION

(1) Whenever operational deployment of any of the Nations' Armed Forces is contemplated, the Status of Forces for such operational activities must be determined in an agreement specifically for the purpose of that operational deployment.

(2) For the purposes of general defence cooperation contemplated in this Agreement, members of the Sending Nation shall respect the domestic laws, customs and traditions of the Host Nation.

(3) The relevant authorities of the Host Nation shall have primary jurisdiction over any member of the Sending Nation for any criminal offences committed in contravention of any laws of the Host Nation, save for instances where such offences are committed in the course and scope of performing their official duties, in which case the Sending Nation shall retain exclusive criminal jurisdiction.

(4) When the exercise of primary criminal jurisdiction by the Host Nation may result in the imposition of Capital Punishment, the Host Nation shall refrain from imposing Capital Punishment, or decline to exercise jurisdiction in favour of the Visiting Nation's right to exercise secondary criminal jurisdiction.

(5) Joint training activities and military exercises if any between the parties Armed Forces shall only take place in areas gazetted in the Host Nation as military training areas.

## ARTICLE 7

### ESTABLISHMENT OF JOINT DEFENCE COMMITTEE

(1) The Parties shall establish a Joint Defence Committee (hereinafter referred to as "JDC") which shall oversee the implementation of all agreements arising out of this Agreement.

(2) Unless otherwise determined the JDC shall meet at least once in two years alternately in the Republic of South Africa and in the Republic of Kenya.

(3) Terms of reference for the JDC shall be developed by the Parties in order to govern, provide guidance, and establish the secretariat of the JDC.

**SECRET**  
ARTICLE 8

**COMMUNITY RELATIONS**

- (1) Members of the Armed Forces of the Sending Nation shall respect and be sensitive to traditions, customs and cultures of the places where they reside in the Host Nation or within the locality of the defence institutions they are attached to within the Host Nation.
- (2) The Service Authorities of the Sending Nation shall ensure that its personnel present in the Host Nation shall not harm vulnerable groups in particular the disabled, women and children.
- (3) The Sending Nation shall pay compensation within the framework of this Agreement where personnel are found liable for causing any death, injury, loss or damage to the persons and/or property of members of such local communities.


**ARTICLE 9**

**CIVIL CLAIMS AND LIABILITIES**

- (1) The Host Nation shall have jurisdiction for civil claims and liabilities arising from activities in its territory under this Agreement. Each Party waives any claim against the other Party or the personnel of the other Party for injury (including injury resulting in death) suffered by its personnel or for damage to or loss of property owned by the Armed Forces if such injury, death or damage or loss was caused by the acts or omissions of the other Party in the course of official duty in connecting to this Agreement.
- (2) The relevant authorities of both Parties shall cooperate in the carrying out of all the necessary investigations into all third party claims, and in the collection and production of evidence, including the seizure and handing over of objects connected with such a claim.
- (3) Where it is established that the Sending Nation, its members, employees or agents are legally liable for such a claim, the relevant authorities of the Host Nation shall submit a report to the relevant authorities of the Sending Nation who shall pay prompt and adequate compensation to the claimants.
- (4) The Parties shall cooperate in the disposal of claims for which they are responsible.

**ARTICLE 10**

**FINANCES**

- (1) The financial implications with respect to the holding of meetings in terms of this Agreement shall be dealt with in accordance with the following principles:
    - (a) Each Party shall bear all its own expenses, including all expenses for meals, accommodation and costs of transportation to and from the port of entry of the Host Nation
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(b) The Host Nation shall bear the cost for conference facilities and ground transportation from the port of entry to the venue of the meeting.

(2) In any other circumstances not otherwise provided for in this Agreement, the liability for costs and expenses as well as any financing procedure shall be as agreed to in writing by the Parties.

## ARTICLE 11

### PROTECTION OF INFORMATION

(1) Each Party shall guarantee the secure handling of classified material, project drafts, technical specifications and any other classified information exchanged pursuant to this Agreement.

(2) The Parties shall in accordance with the domestic law of their countries, accord to all such classified material and information the same or higher degree of security protection as that accorded to its own material and information of equivalent classification.

(3) The corresponding degrees of security classification used by the Parties shall be as follows:

REPUBLIC OF SOUTH AFRICA  
SECRET  
CONFIDENTIAL  
RESTRICTED

REPUBLIC OF KENYA  
SECRET  
CONFIDENTIAL  
RESTRICTED

(4) The Parties shall ensure that classified material, project drafts, technical specifications and any other classified information exchanged pursuant to this Agreement shall be used only for the purposes for which it is obtained.

(5) Unless otherwise agreed by specific agreement between the Parties, the transfer to third parties of information, documents, technical data and materials, either classified or unclassified, obtained pursuant to this Agreement shall be subject to prior written approval of the party who disclosed it.

(6) Should classified information and material be subject to exchange pursuant to this Agreement, a separate security agreement shall be concluded between the Parties.

(7) Visits of one Party's personnel to organizations and/or companies which involve access to classified information shall be controlled and take place according to procedures as stipulated in this Agreement. It shall be mutually certified that visitors have been security cleared.

ARTICLE 12

SECRET

MEDICAL

- (1) The Host Nation agrees to provide any medical support needed by Members of the Sending Party, when in the territory of the Host Nation for the implementation of this Agreement, at the cost of the Receiving Party.
- (2) The Sending Nation shall be liable for all costs for any private medical support utilized by the members of the Sending Nation during the implementation of this Agreement.
- (3) Each Party shall assume responsibility for and bear all expenses relating to the treatment, removal or evacuation of its own sick, injured or deceased personnel.

ARTICLE 13

SUPPLEMENTARY ARRANGEMENTS

With regard to any particular matter contained in the provisions of this Agreement the Parties may enter into such further agreements/arrangements, of a general or specific nature, that will promote the effective implementation of this Agreement.

ARTICLE 14

SETTLEMENT OF DISPUTES

Any dispute between the Parties, arising from out of the interpretation or the implementation of this Agreement shall be resolved amicably through consultation or negotiation between the Parties.

ARTICLE 15

ENTRY INTO FORCE, DURATION, AMENDMENT AND TERMINATION

- (1) This Agreement shall enter into force on the date of receipt of the later written notification by which the Parties notify each other through diplomatic channels of the completion of their respective internal procedures required for the entry into force of the Agreement.
- (2) This Agreement shall remain in force for a period of five (5) years and shall be automatically renewed for further periods of five (five) years unless terminated by either party giving six (6) months written notice of its intention to terminate the Agreement.
- (3) The termination of this Agreement shall not affect the implementation of any other agreement, convention or contract concluded under this Agreement, except where the Parties provide otherwise.

**SECRET**



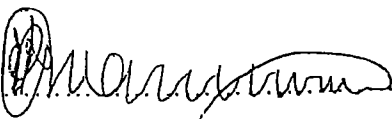
(4) The provisions of Article 10 shall remain in force after the termination of this Agreement.

(5) This Agreement may be amended by mutual consent of Parties through an Exchange of Notes between the Parties through the diplomatic channel. The amendment shall enter into force on receipt of the reply note confirming the proposed amendment.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed and sealed this Agreement in duplicate in the English language.

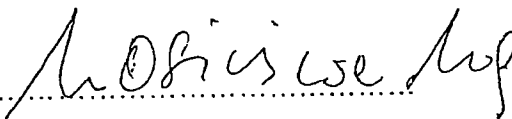
Done at NAIROBI on this 11<sup>TH</sup> day of OCTOBER, 2016.

FOR THE GOVERNMENT OF  
THE REPUBLIC OF KENYA



AMB. RAYCHELLE OMAMO, SC, EGH  
CABINET SECRETARY FOR DEFENCE

FOR THE GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA



MS. NOSIVIWE MAPISA-NQAKULA  
MINISTER FOR DEFENCE